78-419

NO.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

JOS. SCHLITZ BREWING CO.
PETITIONER

v.

ROBERT E. SMITH
RESPONDENT

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE BY RESPONDENT

Robert E. Smith, Pro Se
7 Vista Palm Lane
Vero Beach, Fla. 32960

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ROBERT E. SMITH, RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Robert E. Smith, Pro Se, respectfully prays and hopes that the Court will deny the Writ of Certiorari for a review of the opinion, judgment and order of the Third Circuit in this case in that Court.

JURISDICTION

The Third Circuit Court of Appeals decision of July 14, 1978, and thereafter, a Writ of Certiorari filed by the Petitioner to review the opinion and order of the aforementioned Court.

QUESTION PRESENTED

Whether the United States Supreme Court should consent to hear the Petitioner's request for a Writ of Certiorari inasmuch as the facts and situations involved in the instant case are identical to the *McGarvey v. Merck Co.*, 493F 2D 1401 CA 3 1974 Cert denied 419 US 836 1974. The Respondent has consistently maintained that the District Court erred at the time it reversed its previous May 1976 decision in using the *Goger* decision as its reason for reversal. In the July 14, 1978 decision, the Third Circuit Court of Appeals No. 77-1745 reversed its 1974 *Goger* decision and remanded/instant case for proceedings not inconsistent with that opinion.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein include Sections 14A (633A) and 14B (633B) contained in the ADEA of 1967, 29 USC Section 621 et seq. The Respondent relies on Section 14A (633A); the Petitioner relies on Section 14B (633B).

FEDERAL–STATE RELATIONSHIP AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

> Sec. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supercede any State action.

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

DISCUSSION

Although the Petitioner contends Section 14B is controlling and the Respondent erred when he failed to commence proceedings with the New York Human Rights Commission, the Respondent respectfully states that his attempt to file with this State agency was rebuked by the State because the Petitioner was no longer within the jurisdiction of New York State. The State then advised the Respondent to file his complaint with the United States Department of

Labor office nearest his home. See *McGarvey* and Judge Garth's July 14, 1978 opinion and his mention of the "uncontroverted" affidavit submitted by the Respondent.

The Secretary of Labor argues that the Section 14B was intended to give the complainant to the State the opportunity and time to achieve "informal conciliation, conference and persuasion." "The construction given this statute by the Secretary of Labor is persuasive, and, as it is that agency which is charged with the administration of the ADEA, it should be given greater deference." *Udall v. Tallman,* 380 US 1 85 S Ct 13 L ED ZD 616 (1964).

Judge Stern, in his opinion of May 28, 1976, in denying the defendant's motion to dismiss, stated:

> "After consideration of all decided cases, this Court holds that 633B Creates no jurisdictional requirement. The language of that section carefully avoids what would have been a simple statement of an exhaustion requirement and suggests that if a State proceeding is brought, the State agency should be given 60 days to act before Federal proceedings supplant it. See Title 29 United States'' Code 633A (emphasis added)

In the same opinion, Judge Stern refers to the *Vasques vs. Eastern Airlines, Inc.* in which Judge Pasquerra, after an exhaustive study of the legislative history of ADEA specifically endorses Judge Garth's opinion stated in *Goger.*

The Secretary in amicus curiae concurred with

Judge Garth. The Secretary, as an administrator or "policeman" if you will, is responsible for the application and administration of the ADEA of 1967 and accordingly should be recognized as an expert in the Act's application.

The Petitioner refers frequently to the *Curry v. Continental Air Lines* CA Cal 1975 513 F 2D 691 to further its argument and position. I quote from the opinion of 9th Circuit's opinion briefly - (decision of District Court was reversed).

> The primary issue in this case is whether the District Court lacked jurisdiction of the suit due to the appellant's failure to defer his complaint to a state agency as required by 29 USC Section 633B. Section 633B requires that a plaintiff defer to the State if (1) the State has a law prohibiting discrimination in employment due to age, and (2) the State has established or authorized a State agency to grant or seek relief from such discrimination. The parties agree that at all relevant times California has had a law making age discrimination in employment unlawful but <u>they disagree as to whether California has established or authorized to grant or seek relief from such discrimination.</u> (emphasis added)

The point I make is that the issue of filing with an appropriate state agency in the instant case exists; whereas the 9th Circuit opinion (of no consequence here) is conjectual. Therefore, I hope the Court disregards the Petitioner's attempt to use this case as one of pertinence to the issue in this instant case.

In *Goger* Judge Garth, in comparing ADEA with Title VII stated:

> "The various dissimilarities between the two Acts (and in particular the presence of Section 633A in ADEA which has no counterpart in Title VII) impel me to the conclusion that there is no requirement that a plaintiff must first attempt to utilize available State remedies before filing suit under the 1967 Act."

FURTHER

> "There is no requirement that a plaintiff must first attempt to utilize available state remedies before filing under the 1967 Act. Further, I do not believe it was the intent of Congress to require, prior to the institution of Federal action, the commencement of a State proceeding which under Sect. 633B need not be concluded and which in any event could be superseded by the filing of Federal action under Section 633A."

In *Vaughn v. Chrysler*, 382 F 143 (E D Mich 1974)the Court held that Sect. 633B "can be waived only when the plaintiff has justifiably and detrimentally relied upon official advice in neglecting to pursue State remedies." This Court cited *Goger* as an example of justifiable detrimental reliance in that a United States Department of Labor official advised Goger's counsel that she was free to institute her action under the Act inasmuch as there was no applicable judicial decision construing the Act.

The Respondent maintains that he, too, relied upon justifiable detrimental advice in filing with the

United States Department of Labor and therefore should be accorded no less equitable consideration than *Goger* and *McGarvey*.

Both Smith and McGarvey relied on such justifiably and detrimental advice from the New York and Pennsylvania Human Rights Commission agencies that their complaints were not within their jurisdiction/and accepted this advice by filing complaints with the United States Department of Labor.

STATEMENT OF THE CASE

Respondent, Robert E. Smith, was employed by the Petitioner, Jos. Schlitz Brewing Co., as its Industrial Relations Manager of the Brooklyn, New York, brewery for some twenty years (1952-1973). During the twenty-first year of employment he was appointed Resident Manager to manage and oversee the sale and eventual shutdown of the plant. As the Company had planned to close the plant since 1969, the Respondent was concerned about his employment until his mandatory retirement age of 65 in September 1976. Letters and conversations during this period indicated that the Company would offer (vs opportunity) the Respondent the first available vacancy. During the end of November 1973 and just prior to the sale of the plant, Scoutten, Senior Vice President of Industrial Relations, had contacted Mr. J. L. Thynne (a former assistant of the Respondent and fifteen years younger) to arrange for a personal interview for the position of Industrial Relations Manager at the new Syracuse, N.Y. plant (in con-

struction with an anticipated production start up date of January 1976). Mr. Thynne's interview in Milwaukee was delayed a few months because of his illness. Nevertheless, the interviews including luncheons with important top management superiors in attendance was held at the end of January 1974 with a number of executives with whom Thynne would either work for directly or with. This position was filled by Ronald Lauterbach (approximately thirty-five years old) in April 1974. The Respondent was advised on 12/21/73 that he was retiring on 12/31/73 by Mr. Scoutten in a hand-written note scribbled on a letter concerning another subject. After many unsuccessful attempts, through personal and phone conversation and correspondence to change Mr. Scoutten's and Mr. Uihlein's (chairman and president) minds, I decided to file charges with the New York Human Rights Commission or the United States Department of Labor complaining that the Company had illegally and wilfully involuntarily retired me in violation of the law.

Immediately following the last letter to Mr. Uihlein on May 2, 1974, I visited the New York Manhattan office of the United States Department of Labor and had conversation with Mr. Novak, who advised me to file my complaint with the United States Department of Labor office nearest my home (Paterson, New Jersey) I then called the New York State Human Rights Commission and asked to speak to someone expertised in advising me on how to file

a complaint of age discrimination against the Jos. Schlitz Brewing Co. After considerable conversation, mostly consisting of this person questioning me, he advised me that inasmuch as the Jos. Schlitz Brewing Co. was no longer conducting business directly in New York, and because it had no corporate or regional office in New York, the State of New York could not entertain any grievance against Schlitz, and that these requirements were essential ingredients enabling the State to handle such a matter. He then advised me to file suit with the United States Department of Labor nearest my home. I then proceeded to go to the United States Department of Labor in Paterson, N.J., where I filed my complaint on June 17, 1974.

On Dec. 23, 1975 I filed a complaint with the United States District Court in Newark, N.J.

REASONS FOR DENIAL OF WRIT OF CERTIORARI

The *McGarvey v. Merck* suit contains the same basic facts and situations as contained in the instant case. Citation - *McGarvey v. Merck & Co.*, 493 F 2D 1401 Cert denied 419 U.S. 836. (Emphasis added.)

As Justice Garth states in his 3rd Circuit's opinion in July 14, 1978 decision:

> "The actions which Smith took in pursuit of his claim are set forth in detail in an uncontroverted affidavit, which was filed in opposition to Schlitz's motion for summary judgment." (emphasis added)

The Respondent contends that if the Petitioner

intends to controvert this affidavit, its action is untimely and irrelevant at this moment (see Page 2A of Judge Garth's opinion).

Again, from Judge Garth's 3rd Circuit opinion (see page 4A)

> [10] "At an earlier proceeding the District Court had denied Schlitz's motion to dismiss Smith's complaint as it interpreted Goger not as a strict jurisdiction but one that permitted equitable relief, 419 F Supp 770 12 FEP CASES 1494 D NJ 1976. (emphasis added)

Love vs. Pullman Co. 404 U.S. 522 - I quote from pages 17 and 18 from the Secretary of Labor amicus curiae dated January 1978:

> "The Court perceived no reason to require an aggrieved individual to take further action, noting that the creation of additional procedural technicalities are particularly inappropriate in a statutory scheme in which the layman, unassisted by trained lawyers, initiate the process" 1D at 527.

If in the opinion of the Court the Respondent failed in his effort to correctly file a complaint in accordance with the New York State Human Right Commission, the question is not answered as to what he should have done to file a legal complaint. In not understanding the combination of the United States Department of Labor's information pamphlet and

Section 14B, the respondent followed his interpretation of 14 A.

Gabrielle v. Chrysler Corp. 573 F 2D 949 (6th Circuit 1978)

> The Court could not find anything in the ADEA's legislative history to justify a different interpretation of 633 (b). The court held, however, that equitable considerations in that case excused the plaintiff's failure to resort to the appropriate state agency and the case was remanded to the district court for a hearing on the merits. [8]

> [8]The court's remand indicates that it did not consider prior resort to a state agency jurisdictional in the sense that absent such fact the district court would not have power to hear the case. Rather, it considered this requirement a statutory condition precedent to suit in federal court, subject to equitable considerations. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977).

Judge Garth filed a concurring opinion in *Goger* in which he agreed that the case should be remanded for consideration of the merits of the complaint. He disagreed, however, that 633 (b)'s similarity to 42 U.S.C. 2000e-5(c) mandated construing the two statutes similarly. He concluded "there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act." *Id.* at 17. He approved the position taken there by the Secretary of Labor as *amicus curiae* that resort to a state agency is completely optional and the 633 (b)'s sixty-day waiting period applies only *if* one has chosen to pursue state relief. [9]

We agree with the reasoning of Judge Garth in *Goger* and reject the holding of the majority in that case. [10]

ADDITIONAL REASONS FOR DENYING CERT.

1. The *McGarvey v. Merck Co.* 493 2D 1401 CA 3 1974 (cert denied 419 US 836 1974) should have been the precedent case involved when the Petitioner (defendant) submitted a motion to dismiss in February 1976 - instead of *Goger.*

2. The above *(McGarvey)* and the instant case are the only cases/on record with the same set of circumstances in which both were denied the opportunity to file complaints with the State agencies because they lacked jurisdiction. Both were advised to file with the United States Department of Labor.

3. If Section 14B's intent was to insist on resort to State filing, it would have taken a simple addition of a few words to make that a requirement. See Judge Stern's opinion in Petitioner's request for Writ of Certiorari - Appendix A.

4. Respondent's "uncontroverted" affidavit was not challenged. The Company was aware of my complaint to the United States Department of Labor as early as July 1974, so ignorance is no excuse.

5. What does a complainant do when a State agency refuses to accept a complaint and then advises complainant to file with the United States Department of Labor.

6. My original complaint filed June 17, 1974 was

transferred from Milwaukee, Chicago, New York City, Chicago, Washington, D.C., New York City back to Milwaukee and then finally to Chicago over a period of some seventeen months.

7. The Secretary of Labor in his "amicus" briefs amply, sufficiently and intelligently presented the intent of Sections 14A and 14B. See *Smith* and *Holliday* dated Jan. 1978.

8. See *Sutherland v. SKF* - Sutherland had not been advised by the United States Department of Labor of the existence of a State agency (Pennsylvania Human Relations Commission) by the United States Department of Labor until the Pennsylvania Human Rights Commission's time limitation had expired. The District Court extended equitable consideration and the case was heard on its merits.

CONCLUSION

The Respondent hopes and prays that the Court resolves this question (in his favor) so that future complainants will not consume some five years of their latter years arguing technical questions of minimal importance rather than deciding the merits of the case, "Did the Company discriminate because of age, or did it not."

If the members of the Court did have the pleasure of seeing "60 Minutes" on Sunday, Oct. 8, 1978, they would have heard actor and author, Garson Kanin report on a program entitled "Too Old? Sez Who?" Mr. Kanin, reports:

> "The Bureau of Labor Statistics tells us that men who are forcibly retired from their jobs have an average life span of 30 to 40 months. Now that's something to ponder because when a man is retired mandatorily he's not only being retired, he is being sentenced to death." Source: 60 Minutes, CBS Television Network, Sunday, Oct. 8, 1978.

As we all know, the law has been changed lately so that no person can be mandatorily retired before 70 years old.

In the "amicus" brief by the United States Department of Labor of the Holliday and Smith cases, the Department requests that the interpretation, application and decision by the United States Supreme Court provide for a more humane and a more common sense approach to a problem that contains pitfalls so important to the older citizens of this country whose time is running out. Senator Javits, the Act's principal sponsor, demonstrated concern to minimize delays, which plague so many of our agencies such as the Employee Economic/ Opportunities Council and the National Labor Relations Board . . . delays which are always unfortunate, but particularly so in the case of older citizens to whom by definition have relatively few years left.

Finally, it is the opinion of the Respondent that the Petitioner's desperate and insatiable desire to argue a very, very technical point contained in a

very ambiguous Section 14B is a defensive tactic to prevent the truth and merit of my complaint contained in documented records from surfacing in public court of law. I sincerely hope and pray that this Court will deny the Petitioner's request for a Writ of Certiorari but instead remand to the District Court for a hearing on the merits - whatever the result.

The ADEA is a remedial and humane Act which should be liberally construed to effectuate the purposes of the Act. The Court should recognize and give full weight to the fact that Respondent is not a lawyer but a layman trained in labor relations, some social, state and federal legislation but has never had exposure to the ADEA until early 1974. I have read in many ADEA complaints that many of our esteemed justices have stated that the intent of the law is most important; not meant to be punitive in its application but meant to be remedial and humanitarian and purposely designed to prevent indiscretions by employers in their relationships with their employees.

Therefore, the judgment of the United States Court of Appeals, Third District, should be upheld and sustained, and the case reinstated and remanded to the United States District Court for trial on the merits of the complaint, as the facts of the instant case differ from those in other Court of Appeals cases.

Respectfully submitted,

Robert E. Smith, pro se